No._____

In the Supreme Court of the United States

EX PARTE DANIEL CLATE ACKER,
Applicant.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE
MR. ACKER IS SCHEDULED TO BE EXECUTED ON SEPTEMBER 27, 2018

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CAPITAL CASE

QUESTION PRESENTED

In a series of cases beginning with *Dunn v. United States*, 442 U.S. 100 (1979), this Court held that due process precludes a court reviewing a criminal conviction from upholding the judgment on the basis of a theory of liability that was not tried to the jury. In capital cases, this Court has long recognized that the imposition of the death penalty must both be fair and appear to be fair, and ensuring that appearance of fairness requires that a defendant have the opportunity to explain or deny the factual basis for a death sentence. *Gardner v. Florida*, 430 U.S. 349, 358 (1977). More recently, this Court has affirmed the idea that the legitimacy of the criminal justice system depends on the ability and willingness of courts to correct errors affecting a person's liberty. *Rosales-Mireles v. United States*, 585 U.S. ___, Slip op. at 9, 10 (2018).

This case weaves these threads together and asks whether due process requires a state post-conviction review process in those rare instances where a State has repudiated a false theory of criminal liability on which it based a death sentence, but intends to carry out that sentence based on a new theory of liability that was never subjected to an adversarial testing.

LIST OF PARTIES TO THE PROCEEDINGS BELOW

This petition stems from a habeas corpus proceeding in which Daniel Clate Acker, was the Applicant before the Texas Court of Criminal Appeals in a subsequent application for a writ of habeas corpus. In previous matters, Mr. Acker was the petitioner before the United States District Court for the Eastern District of Texas, as well as the Applicant and Appellant before the United States Court of Appeals for the Fifth Circuit and this Court. Mr. Acker is a prisoner sentenced to death and in the custody of Lorie Davis, the Director of the Texas Department of Criminal Justice, Institutional Division ("the Director"). The prosecuting attorney of the 8th Judicial District Court of Hopkins County, Texas and the Director and her predecessors were the Respondents before the Texas Court of Criminal Appeals, the United States District Court for the Eastern District of Texas, as well as the Respondent and Appellee before the United States Court of Appeals for the Fifth Circuit and this Court.

Mr. Acker asks that the Court issue a Writ of Certiorari to the Texas Court of Criminal Appeals.

RULE 29.6 STATEMENT

Applicant is not a corporate entity.

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EX PARTE DANIEL CLATE ACKER,
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Daniel Clate Acker respectfully petitions for a writ of certiorari to review the judgment and decision of the Texas Court of Criminal Appeals.

OPINIONS BELOW

On September 18, 2018, the Texas Court of Criminal Appeals ("TCCA") dismissed Mr. Acker's subsequent application for a writ of habeas corpus and denied his motion for a stay of execution. *Ex parte Acker*, No. WR-56,841-06 (Tex. Crim. App. Sept. 18, 2018 (*per curiam*) (Appendix A). In previous state proceedings, the TCCA denied Mr. Acker's direct appeal on November 26, 2003. *Acker v. State,* No. AP-74,109, 2003 WL 22855434 (Tex. Crim. App. November 26, 2003)(not designated for publication). (Appendix B). His initial state post-conviction application was denied on November 15, 2006. *Ex Parte Daniel Clate Acker,* No. WR-56,841-01 and WR-56,841-03, 2006 WL 3308712 (Tex. Crim. App. November 15, 2006)(*per curiam*)(not designated for publication). (Appendix C). A subsequent writ application was dismissed by the TCCA on Sept. 10, 2008, without reaching the merits, that Court

determining that Mr. Acker's claims did not meet the requirements of Tex. Code Crim. Proc. Article 11.071 Sec. 5. *Ex parte Acker*, No. WR-56,841-04, 2008 WL 4151807 (Tex. Crim. App. Sept. 10, 2008) (not designated for publication). (Appendix D). A pro se application was dismissed without prejudice by the TCCA on May 14, 2014, because federal proceedings were pending. *Ex parte Acker*, No. WR-56,841-05, 2014 WL 2002200 (Tex. Crim. App. May 14, 2014). (Appendix E).

In the previous federal proceedings, the unpublished decision of the federal district court that Mr. Acker sought to appeal, *Acker v. Director, TDCJ*, No. 4:06-cv-469 (E.D. Tex.), 2016 WL 3268328 (June 14, 2016) (denying Mr. Acker's petition for writ of habeas corpus and a certificate of appealability) is attached as Appendix F. On August 14, 2017, the United States Court of Appeals for the Fifth Circuit issued an Opinion denying a certificate of appealability on four issues. This Opinion, reported as *Acker v. Davis*, 693 F. App'x 384 (5th Cir. 2017), is attached as Appendix G. The docket entry of the denial of *en banc* rehearing on September 13, 2017 is attached at the end of Appendix G. This Court then denied Mr. Acker's petition for certiorari on April 16, 2018. *Acker v. Davis*, No. 17-7045. (Appendix H).

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) and § 2241. The federal district court had jurisdiction over the habeas cause under 28 U.S.C. §§ 2241 & 2254. Under 28 U.S.C. § 2253, the Fifth Circuit Court of Appeals had jurisdiction over uncertified issues presented in the Application for a Certificate of Appealability ("COA"). This Court has jurisdiction, pursuant to 28 U.S.C. § 1254(1) over all issues presented to the Fifth Circuit under 28 U.S.C. §§ 1291 & 2253.

CONSTITUTIONAL PROVISIONS INVOLVED

The question presented implicates the Fifth Amendment to the United States Constitution, which provides in pertinent part that "[n]o person...shall be deprived of life, liberty or property, without due process of law." U.S. CONST. amend. V.

The question also implicates the Sixth Amendment right to counsel: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. CONST. amend. VI.

This case also involves the Eighth Amendment to the United States Constitution, which precludes the infliction of "cruel and unusual punishments..." U.S. CONST. amend. VIII.

The case also involves the Fourteenth Amendment to the United States Constitution which applies the Fifth Amendment to the states and which provides, in pertinent part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

A. Procedural Summary.

Mr. Acker is scheduled for execution on September 27, 2018. He is incarcerated on death row at the Polunsky Unit of the Texas Department of Criminal Justice at Livingston, Texas, in the custody of Respondent. In March 2001, Mr. Acker was convicted in the 8th District Court of

Hopkins County, Texas of the capital murder of his girlfriend Marquetta George.[1] The jury answered the special issues pursuant to Texas Code of Criminal Procedure article 37.071, and the trial court set punishment at death.[2]

On November 26, 2003, the TCCA affirmed Acker's conviction and sentence of death. *Acker v. State,* No. AP-74,109 (Tex. Crim. App. November 26, 2003)(not designated for publication).[3]

Mr. Acker sought state post-conviction relief and filed an application through court-appointed counsel Mr. Toby Wilkinson.[4] The initial state petition and a *pro se* petition were denied on November 15, 2006. *Ex Parte Daniel Clate Acker,* No. WR-56,841-01 and WR-56,841-03 (Tex. Crim. App. November 15, 2006)(*per curiam*)(not designated for publication).[5]

Mr. Acker filed his federal petition in the federal district court on November 14, 2007.[6] On December 12, 2007, the district court held proceedings in abeyance.[7] Mr. Acker filed a subsequent writ application in the trial court on February 7, 2008, which was dismissed by the TCCA on September 10, 2008, without reaching the merits, that Court determining that Mr. Acker's claims did not meet the requirements of Tex. Code Crim. Proc. Article 11.071 Sec. 5. *Ex*

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[1] USCA5.353-355 (indictment); USCA5.365 (verdict). The federal Record on Appeal is referred to as "USCA5.[page]." The trial Reporter's Record is referred to as "[volume number] RR [page]."

[2] USCA5.374-375 (judgment).

[3] USCA5.420-440. (Appendix B).

[4] USCA5.378 (appointment); USCA5.443-519 (state post-conviction writ).

[5] USCA5.556-557. (Appendix C).

[6] USCA5.94-350.

[7] USCA5.1040-1042.

parte Acker, No. WR-56,841-04 (Tex. Crim. App. Sept. 10, 2008) (not designated for publication).[8] Mr. Acker then filed his "Post-Exhaustion Petition for Writ of Habeas Corpus" in the federal district court. That Court ordered an evidentiary hearing on Claim One, relating to actual innocence. The hearing was held on June 16, 2011.[9] Post-hearing briefs were submitted.[10] While awaiting an opinion, a *pro se* application was dismissed *without prejudice* by the TCCA on May 14, 2014, because federal proceedings were pending. *Ex parte Acker*, No. WR-56,841-05, 2014 WL 2002200 (Tex. Crim. App. May 14, 2014).[11] The district court denied relief on July 8, 2016, a little over one month after the case had been transferred to a new judge, who also denied a certificate of appealability ("COA") on all issues.[12]

In the Fifth Circuit Court of Appeals, Mr. Acker applied for a COA on November 16, 2016. The Fifth Circuit denied a COA on these claims on August 14, 2017. *Acker v. Davis*, 693 F. App'x 384 (5th Cir. 2017).[13] Rehearing was denied on September 13, 2017. *Acker v. Davis*, No. 16-70017 (5th Cir.)[14]

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[8] USCA5.25-26. (Appendix D). This was prior to the State's expert's disavowal of the trial theory that Mr. Acker strangled the victim; and prior to the State's disavowal of that theory and adoption of two new and incompatible theories that were never presented to Mr. Acker's jury.

[9] USCA5.2058-2219 (transcript of hearing).

[10] USCA5.1827-1846 (Respondent's brief); USCA5.1847-1909 (Acker's brief).

[11] Appendix E.

[12] USCA5.1946-2054; *Acker v. Director, TDCJ*, 2016 WL 3268328 (E.D. Tex. June 14, 2016). (Appendix F).

[13] Appendix G.

[14] Docket entry of September 13, 2017, denying petition for rehearing (at end of Appendix G).

A petition for *certiorari* was filed in this Court on December 11, 2017, and *certiorari* was denied on April 16, 2018. *Acker v. Davis*, No. 17-7045.[15] On May 7, 2018, Judge Eddie Northcutt of the 8th Judicial District Court of Hopkins County, Texas, set an execution date of September 27, 2018.[16]

On August 31, 2018, Mr. Acker filed a subsequent application for a writ of habeas corpus and a motion for a stay of execution in the trial court. *Ex parte Acker*, No. WR-56-841-06 (TCCA), No. 0016026 (trial court, 8th Judicial District Court, Hopkins County, Texas). On September 18, 2018, the TCCA denied the application and the stay.[17]

B. Factual Summary of Evidence Presented at Mr. Acker's Trial.

1. The liability phase.

Mr. Acker has consistently and unwaveringly stated that the victim Markie George jumped out of his truck. He has admitted abducting her but her death was a tragic accident, and never a homicide. At trial, his efforts to show his innocence were stymied by the trial court.

At the liability phase of the trial, two witnesses said that the night prior to Ms. George's death, Mr. Acker had been drinking, he got into an argument with her, and made some threats against her. (19 RR 22-34) However, one of these witnesses, Mary Peugh, testified she did not take Mr. Acker's threat as a serious statement and hence did not warn Ms. George (19 RR 26) and another, Timothy Mason, admitted that he had a past disagreement with Mr. Acker. (19 RR 45.) Dorcas Dodd Vititow, Mr. Acker's older sister, testified that he was acting as if he was

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[15] Appendix H.

[16] That Court's Order for Execution and the Warrant of Execution are included as an appendix to Mr. Acker's motion for a stay of execution.

[17] Appendix A.

getting jealous and she asked him to stay out of trouble (19 RR 63), but she did not see him get into any altercation with Ms. George. (19 RR 80.) The next morning, Mr. Acker came by Ms. Vititow's house again, crying and angry and still looking for Ms. George. (19 RR 73.) Acker said he was going to beat George and the person she was with when he found them. (19 RR 74.)[18] At this time, Mr. Acker was driving a utility truck belonging to his employer, Bentley Electric. (19 RR 74.)

Lila Seawright**,** the victim's mother, testified that on the morning of Sunday, March 12, 2000, at about 9:15 a.m., Mr. Acker was still looking for Ms. George. Mr. Acker made an alleged threat against Ms. George and whoever she had spent the night with. At this time, Mr. Acker was in control and not upset. (19 RR 103.) Mr. Acker was possessive of Ms. George, but Ms. Seawright never saw him hurt, beat or threaten George, and never saw them fight. (19 RR 108, 114, 117.)

Thomas Smiddy testified at trial that he was the caretaker of the trailer rented by Markie George which was next door to Mr. Smiddy's. (19 RR 136-137.) On the morning of March 12, 2000, Mr. Acker, driving a white utility truck, returned to his trailer. (19 RR 138, 152.) Markie George arrived a little before 11 a.m., accompanied by a man. (19 RR 144.) She went into the trailer and the man left. (19 RR 145.)[19] Ms. George and Mr. Acker were not arguing. (19 RR 145.) After about half an hour, Ms. George ran to Mr. Smiddy's house and hollered at him to call the sheriff. (19 RR 146, 162.) She appeared to be afraid of Mr. Acker, and hid behind Mr. Smiddy's wife. (19 RR 146.) Ms. George also said "He's not going to whup me this time." (19

[18] However, this statement was only made in her second statement but not the first. (19 RR 82-83.)

[19] Shortly after she entered the trailer, she came back out and was talking to the man that had brought her home before he left. 19 RR 161.

RR 163.) Mr. Acker then came and picked her up and walked off with her. (19 RR 147.) George was hitting him as she was carried away. (19 RR 165.) He placed her in the driver's side of the truck. (19 RR 147, 151.) It appeared that she was resisting. (19 RR 175.) Mr. Smiddy testified that when Ms. George was being pushed into the truck, it was like watching someone try to push a cat into a bathtub. At this point, Mr. Smiddy heard something that sounded like someone being hit. (19 RR 165, 175.)[20] The witness looked away for an instant and then Ms. George was not visible in the truck. (19 RR 148.)

Mr. Smiddy then saw Mr. Acker's truck pulling out of the driveway and swerving from side to side in the road. (19 RR 149.) He was going slowly. (19 RR 176.) At one point, the truck veered into the ditch and came back onto the road. (19 RR 169.) Mr. Smiddy then called the police when he saw which way the truck was going. (19 RR 149, 170.) This was at about 11:45 a.m. (19 RR 171.)

Alicia Smiddy, Thomas Smiddy's wife, recalled Markie George running out of her trailer, yelling that someone should call the sheriff, and hiding behind her. (19 RR 179.) Mr. Acker came over, picked George up, and carried her to a truck where he tried to put her in it. (19 RR 179.) Ms. Smiddy heard a slap sound and then Ms. George went in the truck. (19 RR 181.) They drove off swerving from side to side on the road. (19 RR 179-180.) As Acker drove away, it seemed as if he was leaning over towards the middle of the seat (19 RR 182) and he could have been trying to keep George from jumping out. (19 RR 187.) Although at trial Ms. Smiddy stated that George did not attempt to exit the truck after they drove away, on the day of the incident this witness gave a statement to the deputies that said "she [George] was trying to get out of the car as it spun out through the ditch." (19 RR 186, 191.)

[20] This statement was not made by Mr. Smiddy in his initial statements to law enforcement.

Brodie Young, a crucial State's witness, admitted to giving false statements to law enforcement. On March 12, 2000, at around noon, he was heading toward Sulphur Springs and saw a white utility truck parked part of the way in the road (19 RR 201) with one person on the driver's side. (19 RR 204.) Mr. Young slowed down and went into the ditch as the truck was partly blocking the road, and as he passed it he saw a person who looked like he was talking to himself. (19 RR 205, 220.) The man got out of the truck and opened the passenger door and pulled a lady out. (19 RR 206-207.) He took a few steps backward and then laid her on the side of the road and got back in his truck and took off. (19 RR 208.) The truck headed south until it turned on Road 3504. (19 RR 210.) *It did not run over the woman*. (19 RR 231.) Mr. Young went directly to the sheriff's office. (19 RR 208.)

Mr. Young admitted that on the day of the incident, he talked to Officer Wright and told him a story that was false, that he saw a man and a lady fighting in the truck. (19 RR 225-226.) "I retracted that later on because I realized that was a false statement...after I thought about it." (19 RR 226.) Young admitted that he didn't see a man and a woman fighting in the truck, but he initially told the officer that he did. (19 RR 226.) In all, Mr. Young gave three statements about the incident. (19 RR 227.) In the initial statement he said he saw a parked truck and inside it, a man and a woman who appeared to be fighting. (19 RR 228.) Young admitted "exaggerating some." (19 RR 228.) In a second statement given at Officer Wright's office, Young said the person in the truck was about thirty years old and he appeared to be talking to himself. (19 RR 229-230.) In the statement Young said that the man had her underneath her arms and pulled her *out of the truck*, holding her like someone who has gone to sleep. (19 RR 230.) Mr. Young also gave a statement to defense counsel. (19 RR 234.) The witness claimed the only thing he "retracted out of the statement is the first time I said I saw a man arguing with a lady or fighting

with a lady. Later on, I retracted that and said I just saw a man sitting in the truck." (19 RR 237.) On the first statement, "I was exaggerating on that and I changed it later." (19 RR 238.) Mr. Young claimed that the only time he saw the lady is when she was pulled out of the truck. (19 RR 238.)

Dr. Morna Gonsoulin**,** the assistant medical examiner with the Harris County Medical Examiner's Office, performed the autopsy on Ms. George. (20 RR 200.) The State's case for Mr. Acker's guilt rested to a great degree on her erroneous testimony, although, even at the time of the trial, she was still an intern and had not completed all of the requirements to be a medical examiner. (20 RR 273.) Dr. Gonsoulin testified that there were several blunt force injuries to the body, particularly the head and the neck. (20 RR 201.) There were contusions to the chest and a hip abrasion, and a large laceration on the leg. (20 RR 201.) Several of the injuries appeared to be postmortem. (20 RR 201.) There were several internal injuries, lung and liver lacerations, rib fractures, and internal injuries to the trunk. (20 RR 202.) Many of these injuries were postmortem, including an abrasion of the skin, and a laceration of the leg. (20 RR 204.) There was also a skull fracture and the head was crushed, consistent with being struck with a blunt instrument. (20 RR 208.) The victim had a .07 blood alcohol content at the time of her death. (20 RR 266.)

The neck and internal injuries were not likely postmortem, and they included hemorrhage to the neck muscles, and contusions or bruises to the thyroid. (20 RR 209.) These injuries indicate that there was a lot of pressure around the neck while the decedent was still alive. (20 RR 209.) There was some hemorrhage associated with the carotid and jugular arteries. (20 RR 212.) There would not be such hemorrhage if the injury occurred after death. (20 RR 213.)

There was bruising from pressure being placed on the neck, thyroid and windpipe areas. (20 RR 214.)

The external injuries were consistent with motor vehicle injuries. (20 RR 215.) The neck injuries indicate that there was a lot of force applied when she was alive. (20 RR 215.) It was more from being constricted than from a fall. (20 RR 216.) There were also small hemorrhages in the blood vessels of the eye that were consistent with strangulation injuries. (20 RR 217.) The injuries Gonsoulin observed were allegedly consistent with strangulation. (20 RR 218.) There was not enough evidence to tell whether it was manual or ligature strangulation. (20 RR 218-219.) The exterior blunt force injuries were, in the witness's opinion, caused either at or near death or postmortem and occurred after the strangulation injuries. (20 RR 219.) Either of these categories of injuries could have caused death. (20 RR 220.)[21] Dr. Gonsoulin's opinion was that Ms. George died as a result of homicidal violence, including strangulation and hence the manner of death was homicide. (20 RR 221.) The exterior injuries were consistent with being hit by great force. (20 RR 226.)

The witness could not tell how long prior to George's death the strangulation marks may have been made. (20 RR 230.) Thus, it was impossible to say that the victim died from strangulation alone. (20 RR 233.) Death by strangulation can take several minutes. (20 RR 232.) The blunt force injuries were sufficient to cause her death. (20 RR 233.)

The victim also had road rash. (20 RR 235.) This is consistent with jumping out of a vehicle. (20 RR 235.) There would have been no more extensive bleeding after the observed heart damage (20 RR 257) or after the brain stem was broken. (20 RR 264.)

[21] The witness stated that the injuries compatible with strangulation did not necessarily cause death, as these injuries could have been inflicted well before the victim's death. (20 RR 230-231.)

There was a brush burn to the victim's hip which was the same injury called "road rash." (20 RR 263-264.) There were no petechiae in the brain or larynx which would normally be caused by an increase in pressure through strangulation. (20 RR 266-267.) After the strangulation injuries the victim had suffered, Dr. Gonsoulin testified, it is likely she would have been incapacitated. (20 RR 269.) At the time of the autopsy, Gonsoulin was still an intern and had not yet qualified to be a medical examiner. (20 RR 273.)

The defense case at the guilt phase was hindered by various trial court rulings that prevented the jury from hearing evidence of Mr. Acker's innocence. Sabrina Ball, who lived near Mr. Acker's mother Nancy Acker, testified that on the night of February 26, 2000, two weeks prior to her death, she met the victim. (21 RR 8.) Outside the presence of the jury, the witness stated that Ms. George came to Ms. Ball's door that night at about 10:30 p.m. (21 RR 10.) Ms. George was down on her hands and knees crying and saying "Help me, help me." (21 RR 11.) She was brought inside and said that Daniel was going to kill her, that he was crazy. (21 RR 11.) Then the Sheriff's Department was called. (21 RR 12.) Ms. George said that she had been at "Bustin Loose" with Mr. Acker and a fight had started and they had left. (21 RR 13.) In the same truck from which she met her death two weeks later, she tried to jump out but Mr. Acker grabbed her by the hair and dragged her back in. (21 RR 13.)

Ms. Ball's testimony about Ms. George's statement was offered under the excited utterance exception to the hearsay rule. (21 RR 14.) When Ms. George first showed up, she was hysterical but gradually calmed down once she was inside and made the call to the police. (21 RR 22-23.) But George was more concerned about the fight in the truck than the fight in the house and that's what she mentioned first to Ms. Ball. (21 RR 25.)

The trial court ruled that only the first part of the victim's statement, about Mr. Acker being crazy, would be admissible, and the latter part about jumping out of the truck was not because it was not an excited utterance, and because she was being questioned about the events. (21 RR 30.)[22] The trial court later ruled that no testimony from this witness was to be considered by the jury. (21 RR 65.) Thus, the jury never heard evidence about Ms. George's prior attempt to jump from Acker's truck and her unusual propensity or willingness to jump from moving vehicles.

William Brandon Anderson, of the Hopkins County Sheriff's Office, testified *in camera* that he was working on February 26, 2000, and responded to a call at Mrs. Ball's home. (21 RR 37.) He testified as to Markie George's attempt to jump from the truck two weeks prior to her death. (21 RR 37-40.) The defense offered this evidence but the trial court sustained an objection to it. (21 RR 41.) Here again, Mr. Acker's jury was prevented from hearing important evidence that pointed to his innocence.

Walter Allen Story**,** a 9-1-1 communications supervisor in Hopkins County, testified that a 9-1-1 radio log recorded a call from Mr. Smiddy at 11:45 a.m. on March 12, 2000, and a call from Mr. Ferrell at 11:47 a.m. (21 RR 69, 72.) Officer Hill arrived at the location at 11:51 a.m. (21 RR 69.) At 11:53 a.m. the officer called in to say there was no pulse. (21 RR 75.)

Nancy Acker, Mr. Acker's mother, testified *in camera* that on March 12 Mr. Acker said that Ms. George had jumped out of the truck and was dead. (21 RR 83.) Once again, the court ruled that this was not an excited utterance and was inadmissable hearsay. (21 RR 104.)

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[22] *Id.* The witness's statement indicates that there was no logical reason to term part of it an "excited utterance" and the part helpful to Mr. Acker not such an utterance.

The defense also had available another witness, Kenny Baxter, who was also told by Mr. Acker that Ms. George had jumped from the truck. (21 RR 105.) Here again, the jury was not allowed to hear this evidence.

John Riley Sands**,** the defense investigator, testified *in camera* that he was asked to see if he could open the door from the driver's seat of the truck. (21 RR 134.) Defense counsel pointed to testimony of "road rash" which indicated the victim hit the ground when the vehicle was moving. (21 RR 134.) Sands obtained a similar truck, a Ford 350 one-ton truck, and he testified *in camera* that he was not able to open the door from the driver's seat without extending himself quite a bit so that he could still see above the dashboard. (21 RR 142.) Sands could not have opened the door and pushed someone out of the vehicle while driving on the road. (21 RR 142.) An objection to this evidence was sustained and the jury was not allowed to hear this testimony. (21 RR 143.) The trial court had earlier denied funds for a defense forensic expert because they had this investigator, but then refused to let him testify as to these forensic matters because he was not an expert. (21 RR 137, 139-143.)

Daniel Clate Acker testified that he lived with Ms. George and her two children for about one month. (21 RR 146.) They had a good relationship as long as neither of them were drinking, but they argued when they drank, usually on the weekends. (21 RR 152-153.) Mr. Acker was an electrician's helper, working on his journeyman's license. (21 RR 154.) The defense asked him about an incident on February 26, 2000, when Ms. George attempted to jump out of the truck. (21 RR 155.) The Court sustained an objection to this evidence. (21 RR 159.)

On March 11, 2000, Mr. Acker and Ms. George arrived at "Bustin Loose" around 10 p.m. (21 RR 176.) They had a disagreement, Ms. George disappeared, and Mr. Acker began looking for her. (21 RR 177-184.) At the club, he did not make any threats against Ms. George, and he

did not remember talking to Tim Mason. (21 RR 192.) That night, Acker went to various motels in Sulphur Springs thinking that she may have rented a room. (21 RR 195; 22 RR 45.) Then he returned to his house and laid down, but did not sleep. (21 RR 196.)

The next morning, Ms. George and Robert McGee, whose nickname was "Calico," a bouncer at the club, pulled into the driveway. (21 RR 211.) Mr. Acker was glad to see her and kissed and hugged her. (21 RR 216.) Mr. McGee said that he had taken Ms. George to her father's house last night. (21 RR 212.) Mr. Acker said that he had been to her father's house but she wasn't there. (21 RR 212.) She then went into the house. (21 RR 212.) Mr. Acker asked Mr. McGee why he was bringing her home when her father had a car. (21 RR 213.) Ms. George then came out of the house and made a comment. (21 RR 216.)

Mr. Acker pulled his truck from a mud patch where it had been stuck. (21 RR 219.) Mr. Acker then went back inside the house and found out that Ms. George had spent the night with Calico. (21 RR 221.) She admitted to sleeping with Calico. (21 RR 222.) Mr. Acker pushed her down on the couch and shook her and told her "just because you're not my wife doesn't mean I don't love you." (21 RR 223.) He did not strangle her but shook her fairly hard. (21 RR 225.) He then slapped her and asked her where Calico lived. (21 RR 225.) Ms. George told him and Mr. Acker got dressed so that he could go to Calico's house. (21 RR 226.)

Then Ms. George ran out the door to the Smiddys' house. (21 RR 227.) Mr. Acker ran out behind her, went to the Smiddys' and picked her up. (21 RR 228.) Acker carried her to the truck and tried to put her in. (21 RR 230.) Mr. Acker then got in and started the truck. (21 RR 231; 22 RR 66.) As they were pulling out of the driveway, Ms. George opened the door and tried to jump out of the truck and Mr. Acker caught her and pulled her back. (21 RR 233; 22 RR 66.) As he leaned way over to grab her, the truck went into the ditch. (21 RR 234.) He

corrected and then went into the ditch on the other side. (21 RR 234.) On the road, he was driving between fifty and sixty-five miles an hour. (21 RR 237.) Ms. George attempted to jump again, and Mr. Acker slapped her. (21 RR 238; 22 RR 77.) Mr. Acker tried to talk to her but she wouldn't respond. (21 RR 240.)

On a one-lane road, a car approached and he pulled to the side and then she jumped from the pickup. (21 RR 241.) Mr. Acker tried to stop her but could not catch her, and she jumped. (21 RR 242.) Acker stopped the truck and backed up. (21 RR 242.)[23] Another car came down the road and passed him, and then he jumped out and went to Ms. George. (21 RR 242.) Acker dragged her to the truck, opened the door to put her back in the truck but had to put her back down when he realized that there were fluorescent light bulbs on the seat. (21 RR 244.) When he picked her up again, her head fell back and, realizing that she was dead, Acker laid her back down, ran around to the front of the truck and left. (21 RR 244.) He panicked and went into shock. (21 RR 244.) Mr. Acker went to his mother's house. (21 RR 249.) When he was there, a highway patrol car passed by, and he waved it down and was then placed under arrest. (21 RR 250.)

At trial, Mr. Acker was extensively questioned about his knowledge of a defense expert's findings as to strangulation. (22 RR 7-11.) He denied ever seeing Tim Mason at the club and stated he had never met Mary Singleton or Mary Peugh. (22 RR 25.) Mr. Acker denied that he had strangled Ms. George and disputed Dr. Gonsoulin's opinion. (22 RR 7, 91.) Acker was in prison from October 1992 to October 1995 on a burglary charge. (22 RR 106.) After deliberations, the jury found Mr. Acker guilty of capital murder as charged in the indictment. (23 RR 39.)

[23] He did not run over her as he backed up, and denied ever running over her. (21 RR 253.)

2. The punishment phase of the trial.

The State presented several law-enforcement witnesses who testified that there was an incident when Mr. Acker grabbed Ms. George by the hair, put her in a car and slapped her. (23 RR 69). A former wife, Susan Ball was impeached with several letters she had written to Mr. Acker after his incarceration which stated she did love him. (23 RR 87.) She also said he was a great father, further contradicting her earlier testimony. (23 RR 89.)

The defense presented several witnesses at the punishment phase. Dr. Antoinette Cicerello**,** a forensic psychologist, testified that the level of risk Mr. Acker posed in prison and the level of risk should he be released after 40 years, was low. (23 RR 102.) The court sustained an objection to this testimony. (23 RR 105.) On re-direct, the witness stated that Mr. Acker would be a low risk for violence as he would be about seventy when he could first be released. (23 RR 116.) Acker also had trustee status when he was last in prison. (23 RR 116.) He was never in a gang and he responded well to the structure and was allowed to work on a community crew with supervision. (23 RR 117.) Sherry Walker and Dorcas Dodd Vititow, Mr. Acker's sisters, testified to his non-violent nature and low risk of future violent acts. (23 RR 123-134.)

C. The State's Case Was Built Around False Testimony Regarding Strangulation.

In order to establish capital murder liability in Texas the State must prove that the accused intended to kill the victim. *Roberts v. State*, 273 S.W.3d 322, 329 (Tex. Crim. App. 2008); *Black v. State*, 26 S.W.3d 895, 898 (Tex. Crim. App. 2000). The State convicted Acker on the theory that, while driving his truck at high speeds, "it is likely that the decedent was strangled and probably dead or near death prior to being dumped from the vehicle." *Acker v. State*, No. 74,109 (Tex. Crim. App. Nov. 26, 2003) at *5. The State's case was based on the now-discredited and disavowed theory of strangling-while-driving. The State's strangulation

theory was never effectively challenged by Acker's attorneys, mainly because the trial court obstructed their efforts to do so. Defense counsel's requests for forensic experts were denied on the basis that they had been provided with an investigator. But when the investigator attempted to show that Acker could not have pushed her out, the court ruled this inadmissable because his tests were not performed by the very experts for which the court had denied funding.

However, in federal court, the State's post-conviction expert, Dr. Vincent DiMaio, opined at the federal evidentiary hearing that Ms. George was never strangled, agreeing with defense expert Dr. Glenn Larkin. The State's theory of death then changed and the State contended that Acker pushed Ms. George from the truck, a theory never presented to Acker's jury.

The following summary of eleven vital stages of the case shows the centrality of the "strangulation" theory used to convict Acker and sentence him to death.

1. The autopsy was based on the strangulation theory.

The"conclusions" part of the autopsy report, in its entirety, read as follows:

> It is our opinion that Marquette (sic) George, a 33-year old white woman, died as a result of homicidal violence, including strangulation. Several of the injuries identified could be consistent with blunt force injury resulting from an impact with or being ejected from a motor vehicle. *Some injuries (particularly those of the neck and perineum) are not consistent with ejection from or impact with a vehicle; the injuries observed in the neck are more consistent with strangulation.* Further, the dry parchment-like appearance of several abrasions, the lack of associated hemorrhage of the laceration of the right leg, the paucity of hemorrhage in the brain and the amount of body cavity hemorrhage in relation to the severity of the injuries indicate that these injuries were sustained postmortem or perimortem. *Given these findings, it is likely that the decedent was strangled and probably dead or near death prior to being dumped from the vehicle.* [USCA5.1009.] (emphasis added).

Thus, the "blunt force" injuries were not seen as a stand-alone cause of death, but injuries that followed the strangulation and occurred when the victim was "probably dead or near death prior to being dumped from the vehicle."

2. Strangulation was the basis of the indictment

The indictment states that death was caused by "manual strangulation and ligature strangulation with an object....*and* blunt force injury," not "or blunt force injury." [USCA5.353, 355.]

3. The grand jury indicted on a strangulation theory.

Acker was indicted by a grand jury and the foreman of that grand jury, Clayton McGraw, testified as follows at Acker's trial in order to show that they could not determine the nature of the strangulation.

> Q. Can you tell us was the Grand Jury able to determine what object was used in the course of the strangulation of Markie George?
> A. No, sir.
> Q. So it would be a true statement to say that it is unknown to the Grand Jury what object was used?
> A. Yes, sir.
> Q. Was the Grand Jury able to determine whether it was manual strangulation, that is, with somebody's hands, or ligature strangulation with an object such as a rope or a cord?
> A. No, sir.
> (19 RR 128.)

The grand juror also testified that they considered blunt force injuries. (*Id.*)

4. The opening statements told the jury the victim was strangled.

The prosecutor's opening statement told the jury:

> and the doctors tell us she died from strangulation as well as from blunt force trauma. Blunt force injuries. They cannot say which caused her death exactly, but both of her injuries were capable of causing her death. They cannot tell you that she was alive or dead at a particular time when she was run over. *But they can tell you that she was strangled first, and I believe they will, because of the way the body reacts after strangulation.*

(19 RR 19.) (emphasis added).

5. The testimony of the medical examiner was based on strangulation that preceded blunt force injuries.

The medical examiner/pathologist Dr. Morna Gonsoulin told the jury that:

a) "the [the "blunt force" head injuries] were most likely perimortem or postmortem." (20 RR 207.)

b) The bleeding in the neck had to be a result of "some type of force or pressure to be placed upon a person's neck to cause that type of bleeding..." (20 RR 213), the strangulation, and "from local pressure being applied to it." (20 RR 214.)

c) The neck injuries were "not consistent with falling or being hit. It was more of being constricted rather than blunt force received from falling from a vehicle." (20 RR 215-216.)

d) The cause of death was strangulation and she "[wasn't] able to determine which manner of strangulation occurred but that strangulation did occur." (20 RR 219.)

e) The blunt force injuries were either during or after death, hence after strangulation. (20 RR 219.)

f) Strangulation was sufficient, in itself, to cause death. (20 RR 220.)

g) It could not be determined what object caused the strangulation. (20 RR 220.)

h) Strangulation occurred first, but she "can't determine which one she may actually have died from." (20 RR 220-221.)

i) "She was strangled as a result of her injuries and she had blunt force injuries. That's what I told the jury." (20 RR 233.)

j) The strangulation could not have occurred in the trailer, as it would have immobilized the victim and "someone who is limp can't jump out of a truck, can they? ...I would assume if they had an injury they wouldn't." (20 RR 268-269.)

k) The victim was strangled, but it could not be determined what was used to accomplish that. (20 RR 272.)

l) The victim was dead or near death "at the time that she was dumped from the vehicle..." (20 RR 273-274.)

m) The victim died from strangulation "and the blunt force injuries from impacting with something." (20 RR 274.)

6. Acker's cross-examination stressed strangulation.

The state cross-examined Acker on "strangulation":

Q. Did you know?
A. Did I know what?
Q. About strangulation.
A. Strangulation never took place. Markie [George] was never strangled.
Q. The Medical Examiners are just lying?
A. They are incorrect.
Q. They are incorrect.
A. Their opinions are wrong.
q. All those doctors are wrong?
A. Yes, sir.
(22 RR 7.)

Q. Now, the doctor's testimony was that she was strangled but you disagree with that?
A. Yes, sir.
Q. The doctor's lying about that?
A. Yes, sir.
Q. These photographs are lying about the blood in her throat?
A. The blood could have got there any kind of way.
Q. Oh, really.
A. Not necessarily—strangulation not the only thing that causes blood in your throat.
(22 RR 90-91.)

7. The jury charge on guilt stressed strangulation.

The jury was charged with three possibilities for capital murder involving kidnaping, and three possibilities for non-capital murder if the jury did not find kidnaping at the guilt phase of the trial [USCA5.357-361.][24] Of these six theories, four involved the now-discredited strangulation theory. We do not know whether Acker was actually convicted on one of the four

[24] The three theories for capital murder required the jury to find death in the course of kidnaping as a result of 1) manual or ligature strangulation; or 2) blunt force injuries; or 3) strangulation and blunt force injuries; or three theories of non-capital murder if the jury did not find there was a kidnaping, 4) strangulation; or 5) blunt force injuries; or 6) strangulation and blunt force injuries. [USCA5.357-361.]

now-discredited theories. The first one was strangulation alone, and the jury could well have convicted on that false theory without even considering the others.

8. The prosecution's final argument stressed strangulation.

The prosecution's final argument was focused on "strangulation." In a very short final argument of a little more than 17 pages of transcript (23 RR 3-7, 17-30), the prosecutor repeatedly emphasized "strangulation":

> a) "All these doctors ...say it is likely she was strangled and at or near death at the time she received the blunt force injury.
> The doctor told you that in her opinion the strangulation could have caused death. The doctor told you that in her opinion after she was strangled she would have been incapacitated, unable to move. Brain dead, I believe, is the testimony she gave. She could not have jumped out of that vehicle...
> ...She died from strangulation and blunt force trauma."
> (23 RR 5-6.)
>
> b) "These doctors gave their medical opinion on cases that are tried everyday. It is our opinion that Marquetta George died as a result of homicidal violence including strangulation."
> (23 RR 20-21.)
>
> c) "But yet when he's pulling out of that driveway he's leaning over down into the floorboard doing something. And he can't stay on the road. Just like Mr. McDowell says, you can't drive down the road straight and strangle somebody. That's why he was all over the ditch because he had her right then strangling her."
> (23 RR 26-27.)
>
> d) "He's brought down to the Sheriff's office for an interview. What did he tell y'all yesterday? Nobody at this point knows anything's happened to Markie regarding the strangulation but him. Nobody knows. The doctors haven't looked at her yet. You can look at the outside of her body and you can't tell she's been strangled. There's no fingerprints there. There's no cord cut in her neck."
> (23 RR 28.)
>
> e) "He starts lying right then when nobody is asking questions about her being strangled. He lies and he lies and he lies."
> (23 RR 29.)
>
> f) "The doctor says she was strangled. There is no controversy of that. Nobody controverted that. She was alive and well when she left the house. She was physically

> exerting herself to fight against being taken, kidnaped. She was strangled in the course of continuing that kidnaping. She died from it. Capital murder. He's guilty. You know it....."
> (23 RR 29-30.)

Thus, "strangulation" was not only central to the State's case at final argument, it *was* the case for capital murder that was argued against Mr. Acker's testimony, and this is what the jury last heard immediately before they retired to deliberate.

9. The jury inquired about strangulation during deliberations.

During jury deliberations, the jury sent a note to the Court asking for three items, one of which was "pictures of neck from autopsy where layers of skin were peeled away and four sets of pictures at scene where victim was laying on ground at scene." (23 RR 32.) This indicates that the jury was focused on "strangulation" as that is what the pictures of the victim's neck purported to depict. This also weighs against the hypothesis that the jury convicted on "blunt force" injuries alone.

10. On appeal, Acker was held to have strangled the victim.

As the TCCA held on direct appeal, "[t]he State's theory of the case, as expressed in the opening statement... was that the defendant strangled the victim, pulled her out of his truck, and then ran over her body with the truck." *Acker v. State,* No. 74,109 at *14. [USCA5.433.] From the outset, the State's theory was that the victim had first been strangled and the "blunt force" trauma occurred only after that "strangulation." Strangulation figured heavily in the opinion denying Acker's appeal as to several points of error. The TCCA first summarized Dr. Gonsoulin's findings in detail and then stated that "[t]his testimony was consistent with the autopsy report, which came to the following conclusion" and then quoted verbatim that section of the autopsy report given *supra*. *Acker v. State,* No. 74,109 at *4- *5. [USCA5.423-424.]

The TCCA then added more detail on the "neck injuries" of the victim:

> On cross-examination, Gonsoulin admitted that crushing the brain stem—which occurred here—was an injury of the type that would cause instantaneous death by stopping the heart from beating, and thus could explain the lack of hemorrhaging in other parts of the body. The medical examiner also testified that it was possible for one to receive the neck injuries observed and survive. On redirect, however, the medical examiner testified that the neck injuries were so severe that a person suffering from them would have been incapacitated and might be brain dead, even if the heart were still beating. Gonsoulin also testified that the neck injuries occurred within hours of the victim's death. Appellant testified at trial. He denied strangling the victim and denied squeezing or gripping her neck.
> *Id.* at *5. [USCA5.424.]

Point of error number three was ultimately rejected by the TCCA with the finding that "[w]hile appellant's self-serving statement [that the victim jumped] was at odds with the conclusions in the autopsy report, evidence does not become admissible...simply because it may lead to a different conclusion than other, admitted evidence." [*Id.*]

11. On state habeas, strangulation was again featured.

Similarly, the state habeas proceedings, such as they were given the illiterate and incoherent application filed on Acker's behalf, are now rendered erroneous by the false "strangulation" testimony. The "State's Proposed Findings of Fact and Conclusions of Law" [USCA5.529-550], adopted by the trial court and the TCCA, contained many references where the absence of "strangulation" would have made a difference. For instance:

1) As to Claim No. 2, the trial court held that "[t]estimony by Dr. Morna Gonsoulin indicated that the victim could not have jumped out of the vehicle due to her being incapacitated [by strangulation]." [USCA5.531.]

2) As to Claim No. 14, the Court held that "Applicant has failed to show that had Mr. Sands testified as a criminologist, there is a reasonable probability that the outcome of the trial

would have been different." [USCA5.536.] This finding is not now tenable in that "strangulation" has been ruled out.

The Fifth Circuit also acknowledged that "[i]t is true that the State's theory at trial was largely based on strangulation as the cause of George's death." *Acker v. Davis*, 693 F. App'x 384, 394 (5th Cir. 2017).

D. Wrongly Excluded Evidence Of Innocence Also Deprived Acker Of Due Process And A Fair Trial.

As discussed *supra*, the trial court erroneously sustained objections to witnesses who were highly relevant to Acker's case of actual innocence. The trial court disallowed the medical examiner to be questioned regarding injuries if the victim had jumped (20 RR 257-258); erroneously excluded Sabrina Ball's, William Anderson's and Lewis Tatum's testimony regarding the victim's prior attempt to jump from the truck (21 RR 28-30, 40, 41); and excluded defense investigator John Sands testimony regarding the tests that showed Mr. Acker could not have pushed the victim out of the truck (21 RR 129-142).

E. Appellate And State Post-Conviction Proceedings.

The miscarriages of justice continued on appeal when appellate counsel filed a 10-page brief, one of the shortest ever filed in Texas.[25] Even worse, if possible, were Acker's state post-conviction proceedings, where the vast majority of the application consisted of Acker's own memos and letters, submitted verbatim without even basic editing and sometimes without even changing them from the first person vernacular.[26] To characterize Acker's state habeas petition

[25] USCA5.380-392.

[26] *Compare* USCA5.443-519 (Acker's state application) *with* USCA5.586-627. (Acker's letters to appellate counsel attached to his response to contempt proceedings.) State habeas counsel copied them virtually verbatim into his writ application.

as incoherent would be an understatement. This woefully incompetent pleading was the subject of widespread media attention and incredulity.[27]

F. Federal Habeas Proceedings: The State Repudiates Its Trial Theory.

The evidence the jury heard at Acker's trial was significantly different from that adduced at a 2011 hearing in federal court, where the State had to repudiate its strangulation theory. The State's own expert in federal court, nationally-recognized coroner Dr. Vincent Di Maio, opined at the federal evidentiary hearing that Ms. George was never strangled, essentially agreeing with defense expert Dr. Glenn Larkin. At that hearing, the State changed their theory and contended that Mr. Acker pushed Ms. George from the truck, a theory that was never presented to Acker's jury. The State has made no effort to defend the trial theory of guilt of "death by strangulation" heard by Mr. Acker's jury. Instead, they have disavowed it.

The apparent current operative theory of Acker's guilt, the State's third such version, is the federal district court's holding that "Mr. Young saw Applicant pull her from the truck and lay her along the road in front of the truck, that Applicant subsequently ran over Mr. George with his truck, and that was the cause of her death." *Acker v. Director*, No. 4:06-cv-469, 2016 WL 3268328 at *24 (E.D. Tex. June 14, 2016)). *Yet neither Mr. Young nor any other witness ever testified that Acker deliberately ran over the victim. In fact, Mr. Young explicitly denied it*.[28]

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[27] *See* USCA5.872-891 (newspaper articles relating to Acker's state petition and others by state habeas counsel). Some of the media comments were that "the writ echoes Acker's unintelligible arguments, flawed grammar and even his complaint that he was about to run out of paper" [USCA5.874]; that it was "filled with gibberish" [USCA5.878]; and that it "reads as if it was written by someone with an 8th Grade education. In fact, most of it was." [USCA5.879.] However, the only comment this petition elicited from the district court was to point out that "there were 39 actual claims" filed and to characterize criticism of it as "harsh." [USCA5.1993-1994.]

[28] Mr. Young, who told differing versions of his story, including one that claimed he saw Acker and the victim arguing in the truck, testified that Acker pulled her out of the truck and took a few

REASONS FOR GRANTING CERTIORARI

THIS COURT SHOULD GRANT CERTIORARI TO DETERMINE WHETHER DUE PROCESS REQUIRES A STATE COURT TO RECONSIDER A CAPITAL CONVICTION OR SENTENCE WHERE THE STATE, IN POST-CONVICTION PROCEEDINGS, WAS FORCED TO REPUDIATE AND ABANDON THE THEORY OF CAPITAL LIABILITY ON WHICH THE PETITIONER WAS CONVICTED AND SENTENCED TO DEATH

To date, Texas has advanced three different and conflicting theories of Acker's liability for capital murder. At trial, the State contended that Acker strangled the victim while driving, and any blunt-force injuries preceded the strangulation. In federal habeas proceedings, when the strangulation was discredited by their own expert, the State shifted to the theory that Acker pushed the victim out of the truck. Now, however, the theory has once again shifted, and the district court and the Fifth Circuit held that Acker inflicted blunt force injuries on the victim, laid her on the road and then ran over her. *Acker v. Davis*, 693 F. App'x at 395-396. Neither the second nor the third theory was submitted to the jury at trial.

A. Due Process Precludes a Reviewing Court from Upholding a Criminal Conviction on the Basis of a Novel Theory.

This Court has repeatedly held that "we cannot affirm a criminal conviction on the basis of a theory not submitted to the jury." *Chiarella v. United States*, 435 U.S. 222, 236 (1980). In *Dunn v. United States,* 442 U.S. 100, 106 (1979), this Court held that "[t]o uphold a conviction on a charge that was neither alleged in an indictment nor presented at trial offends the most basic notions of due process." This is because "[f]ew constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused."

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steps backward and then laid her on the side of the road and got back in his truck and took off. (19 RR 208.) The truck headed south. (19 RR 210.) *It did not run over the woman.* (19 RR 231.) ("RR" refers to the Reporter's Record, with the volume number preceding the page number).

Dunn at 106 (citing *Eaton v. Tulsa,* 415 U.S. 697, 698-699 (1974); *Garner v. Louisiana,* 368 U.S. 157, 163-164 (1961); *Cole v. Arkansas,* 333 U.S. 196, 201 (1948); *De Jonge v. Oregon,* 299 U.S. 353, 362 (1937)). *Dunn* held "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id.,* citing *Cole v. Arkansas, supra,* 333 U.S. at 201.

Dunn focuses on "the theory on which the case was tried and submitted to the jury." *Dunn,* 442 U.S. at 106. The *Dunn* court "regarded tangential references to [the alternative theory] as insufficient because, in the Court's view, the prosecution did not 'build its case' on such evidence." *Dunn,* 333 U.S. at 106.

Similarly, in *Chiarella ,* 445 U.S. at 236, this Court held

> [w]e cannot affirm a criminal conviction on the basis of a theory not presented to the jury. Even though, as here, the jury was given some words, from which the jury could have inferred a theory of guilt, the inclusion in the jury instructions of words sufficient to include the conviction may be insufficient if they fail to convey the 'nature and scope' of the charged offense.

In *Chiarella,* this Court regarded isolated phrases or side-references to the appellate theory as also constitutionally insufficient. *Chiarella* at 237 n. 21.

As was held in *Cola v. Reardon,* 787 F.2d 681, 697 (1st Cir. 1986)*, "Dunn* requires the appellate theory to be present in the indictment *and* the proof at trial [because] a fundamental sixth amendment concern [is] that guilt be initially adjudicated before a jury based on the government's cases as presented at trial." Because the references to that theory were "at best incidental" the conviction was reversed. *Id.* As that court put it, "where the prosecution's case at trial does not meaningfully reflect the appellate theory, due process cannot be reinstated through implicit references in the indictment." *Id.*

Similarly, in *Rewis v. United States,* 401 U.S. 808 (1971), this Court held the conviction invalid where the government offered an interpretation of the criminal statute upon which the defendant was not convicted. *Rewis* at 813-814. Even though there may have been "occasional situations" where the charged conduct may have violated the act in question, the conviction was reversed because the jury was not charged with this theory. *Id.* In *McCormick v. United States,* 500 U.S. 257 (1991), this Court held that interpreting the criminal statute at issue contrary to the jury instructions resulted in the defendant's conviction being affirmed on legal and factual grounds that were never submitted to the jury. In *McCormick*, the court of appeals interpreted the criminal statute at issue in that case contrary to the jury instructions and then affirmed the defendant's conviction based on that statutory interpretation. *See McCormick,* 500 U.S. at 268–70. This Court decided that this resulted in the defendant's conviction being affirmed on "legal and factual grounds that were never submitted to the jury." *See id.* ("Thus even assuming the Court of Appeals was correct on the law, the conviction should not have been affirmed on that basis but should have been set aside and a new trial ordered."). In *McCormick,* 500 U.S. at 270 n. 8, this Court further stated:

> This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on a different theory than was ever presented to the jury. Appellate courts are not permitted to affirm convictions on any theory they please simply because the facts necessary to support the theory were presented to the jury.

More recently, the First Circuit has held that

> In dealing with criminal defendants, the government must turn square corners. It cannot use bait-and-switch tactics, relying on one theory of the case in the indictment and during the trial and then—after obtaining a favorable verdict—relying on an entirely different theory to uphold the verdict. *See Dunn v. United States*, 442 U.S. 100, 106, 99 S.Ct. 2190, 60 L.Ed.2d 743 (1979). So, too,

> a reviewing court cannot affirm a criminal conviction on the basis of a theory that was never advanced in the trial court. *See Chiarella v. United States*, 445 U.S. 222, 236, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980); *see also United States v. Boulahanis*, 677 F.2d 586, 591 (7th Cir. 1982) (rejecting theory of extension of credit that was "different" from "theory of the extension of credit that the government actually pressed [at trial]").

United States v. Didonna, 866 F.3d 40, 50 (1st Cir. 2017).

B. Due Process and the Legitimacy of the Criminal Justice System Require a Mechanism for Correcting a Miscarriage of Justice

> From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Gardner v. Florida, 430 U.S. 349, 357-58 (1977). That legitimacy in the imposition of punishment

> relies on procedures that are "neutral, accurate, consistent, trustworthy, and fair," and that "provide opportunities for error correction." Bowers & Robinson, Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility, 47 Wake Forest L. Rev. 211, 215–216 (2012)

Rosales-Mireles v. United States, 585 U.S. ___, 138 S. Ct. 1897, 1908 (2018).

What this Court said in *Rosales-Mireles* applies with greater force here due to the sentence imposed by the state court: "'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?'" *Ibid.* (quoting *United States v. Sabillon–Umana*, 772 F.3d 1328, 1333–1334 (10th Cir. 2014) (Gorsuch, J.)).

Acker's subsequent state petition argued that the Due Process Clause of the Fourteenth Amendment required the state court to reconsider the validity of his conviction and sentence based on newly obtained scientific evidence that the theory on which he was convicted was factually wrong and untenable. The TCCA held did not speak to the constitutional question Acker presented. The state court held that Acker's application did not meet the standards for a subsequent application under TEX. CODE CRIM. PROC. art. 11.071 sec. 5(a), sub-sections (1)and (2), two of the well-established exceptions to the bar on subsequent applications contained in that section.

Acker's due process claim imposes no burden on the State of Texas that a fairminded reading of its law did not already impose. Exception 5(a)(1) applied in two respects: both the factual and legal bases of the evidence regarding the falsity of the coroner's "strangulation" testimony were unavailable "on the date the applicant filed the previous application." Only in federal court in 2011, well after Mr. Acker's first state habeas application was filed, did the State admit that the trial evidence of strangulation ,upon which he was convicted, was false, and disavow that theory.

Similarly, the Exception 5(a)(2) also applied, as the State has now presented or relied upon two new versions of a theory of Mr. Acker's guilt: that he allegedly pushed the victim out of the truck and then, changing theories once again, that he immobilized the victim in the truck and then placed her on the ground and deliberately ran her over.[29] Neither new version was

[29] This last theory originated in the opinion of the federal district court, with a newly-assigned judge who did not preside over the federal evidentiary hearing. That theory was contrary to the State's arguments at that hearing, when they asserted that Acker pushed the victim out of the truck. It was also contrary to any trial testimony, where the only witness asserted that Acker *did not* deliberately run over the victim with the truck. That new theory was then adopted by the Fifth Circuit in their opinion.

presented at Mr. Acker's trial by any trial witness and the preponderance of the evidence points to the victim jumping from the truck. Had the jury known that the victim was not strangled and had attempted to jump from the same truck just two weeks prior to her death, exactly what Mr. Acker has said happened on the day of her death, there is a substantial likelihood, and at least a reasonable probability, that no juror would have found Mr. Acker guilty of capital murder.

Additionally, the cost to the State of providing a process in these extraordinary circumstances is no more than what the Texas legislature has been willing to assume. Article 11.073 of the Texas Code of Criminal Procedure provides for a new trial where there is (1) newly available scientific evidence that (2) "contradicts scientific evidence relied on by the state at trial" and (3) that the applicant would probably not have been convicted if the newly-available scientific evidence had been presented at trial. TEX. CODE CRIM. PROC. art. 11.073(a)(2); *Ex parte Robbins,* 478 S.W.3d 678, 690 (Tex. Crim. App. 2014). In *Ex parte Robbins*, the TCCA held that scientific evidence is considered "newly available" where the opinion of the State's expert had changed since trial. 478 S.W.3d at 690. A claim for relief pursuant to article 11.073 should be remanded for a hearing where the facts "are at least minimally sufficient to bring him within the ambit" of the statute. *Id.* Mr. Acker's claims under article 11.073 fit within the holding of *Ex parte Robbins*.

Of course, this claim *could not have been presented on direct appeal* because it was only in federal habeas proceedings that the State changed its theory of the case. Appellate proceedings are limited to the trial record, which did not and could not show that Gonsoulin's testimony was false. At the time of the direct appeal, it could not be known that the State would later disavow their trial theory of strangulation and adopt two different and incompatible theories of Acker's guilt that were not presented to his jury. The State's theory-switching began in 2011,

at the federal evidentiary hearing, well after Mr. Acker's appeal was denied in 2003. Additionally, the State is responsible for the error, as their witness Dr. Gonsoulin presented it to Acker's jury. An additional reason is that Mr. Acker's appellate counsel filed a 9-page brief, possibly one of the shortest ever filed in a capital case this State.[30] Even worse, if possible, were Acker's state post-conviction proceedings, where the vast majority of the application consisted of Acker's own memos and letters, submitted verbatim without even basic editing, mostly without even changing them from the first person vernacular.

In these circumstances, the consistent holdings of this Court---that a conviction cannot be upheld based on a theory not submitted to the defendant's jury—must be applied to Mr. Acker's case.

Judicial adjudication of rights must always comport with due process. This includes criminal post-conviction proceedings, even though "[a] criminal defendant proved guilty after a trial does not have the same liberty interests as a free man." *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52, 68 (2009). While a "state . . . has more flexibility in deciding what procedures are needed in the context of postconviction relief," *id*. at 69, due process nonetheless requires that prisoners be afforded certain procedural rights when post-conviction procedures implicate protected liberty interests. Whenever the judiciary adjudicates rights, the relevant question is never whether process is due, but what process is due.

"There is no higher duty of a court, under our constitutional system, than the careful processing and adjudication of petitions for writs of habeas corpus, for it is in such proceedings that a person in custody charges that error, neglect, or evil purpose has resulted in his unlawful confinement and that he is deprived of his freedom contrary to law." *Harris v. Nelson*, 394 U.S.

[30] The text of the "Brief for Appellant" is at USCA5.384-392.

286, 292 (1969). Despite this, only a handful of this Court's cases have touched on the process a state owes a prisoner who has invoked a post-conviction statute sounding in habeas corpus. Where the factual basis upon which an individual was convicted and sentenced to death has been repudiated by the State in post-conviction proceedings, and the State court fails to provide a process by which the conviction or sentence can be reviewed, this Court should find a violation of due process.

C. Texas Habeas Corpus Framework.

In Texas, habeas corpus in capital cases is governed exclusively by Texas Code of Criminal Procedure, Article 11.071. *Ex parte Davis*, 947 S.W.2d 216, 222 (Tex. Crim. App. 1996). Although habeas corpus is considered a civil action in federal court, in Texas the proceeding is designated criminal in nature. Nevertheless, the proceeding is collateral—the prisoner must initiate it by filing a habeas corpus application and prosecute it—and the prisoner has the burden of proof to establish the unlawfulness of his or her confinement. *See Ex parte Rieck*, 144 S.W.3d 510, 516 (Tex. Crim. App. 2004). Capital habeas corpus proceedings in Texas are original to Texas's highest criminal court, the Court of Criminal Appeals ("TCCA"), but the statute directs that they be filed initially in the convicting trial court. TEX. CODE CRIM. PROC. art. 11.071 § 4. This is because the TCCA, as an appellate court, does not hear evidence, and most habeas applications raise claims that require the resolution of disputed factual allegations in order to adjudicate the matter. *See Ex parte Carlile*, 244 S.W. 611, 612 (Tex. Crim. App. 1922); *Townsend v. Sain*, 372 U.S. 293, 312 (1963) ("It is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues.").

Here, the evidence of innocence adduced federal habeas corpus proceedings compelled the State to repudiate the factual, and also the legal, bases for Acker's conviction. Through his

subsequent state habeas application, Acker sought a remedy from the State which would provide a review of the judgement. The State refused to provide any such remedy or process.

Since 1986, the Court has considered the process owed by a state in post-conviction proceedings in a handful of cases,[31] but none that meaningfully illuminated the process owed a prisoner who invokes a post-conviction statute sounding in the nature of habeas corpus, *i.e*., a procedure for testing the legality of the conviction and sentence. The facts of this case provide the Court with the opportunity to provide guidance in situations such as Acker's, and hold that where the evidence adduced in post-conviction proceedings compelled the State to repudiate the factual basis of a petitioner's conviction, due process requires a State to provide a process for reviewing the judgment.

None of the decisions in *Ford, Panetti,* or *Osborne* have spoken meaningfully to what process a state court owes a prisoner in a post-conviction proceeding sounding in the nature of habeas corpus, *i.e.*, where the prisoner alleges that the underlying criminal judgment pursuant to which he is confined was obtained unfairly and in violation of the United States Constitution. In none of the post-conviction proceedings at issue in those decisions was the validity of the prisoner's conviction or lawfulness of his custody being challenged. Hence, each presumed a fair trial and a prisoner who had been validly deprived of his liberty or life. Thus, the balance of the "interests at stake" is not the same as these cases as it would presumably be in a state post-conviction case that sounds in habeas corpus. Here, not only is Acker challenging the validity of his conviction, but the State has repudiated the factual basis that supported his conviction. In this situation, due process requires the State to provide a process to review the judgment.

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[31] *Ford v. Wainwright*, 477 U.S. 399 (1986); *Panetti v. Quarterman*, 551 U.S. 930 (2007); *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009).

The Court has discussed process in general terms in the context of federal habeas review. In *Townsend v. Sain*, 372 U.S. 293 (1963), the Court illuminated what rules would govern federal district courts when determining whether to hold an evidentiary hearing under the then-existing federal statutory framework. Observing that the function of habeas corpus is to test by way of an original proceeding "the very gravest allegations," the Court held that the opportunity for redress that habeas corpus presents "presupposes the opportunity to be heard, to argue and present evidence." *Id*. at 311-12. For "[i]t is the typical, not the rare, case in which constitutional claims turn upon the resolution of contested factual issues." *Id*. at 312. While the Court overruled *Townsend* in part in *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), and the Antiterrorism and Effective Death Penalty Act (AEDPA) altered the federal statutory framework for federal courts reviewing habeas corpus applications from prisoners challenging state court judgments, neither development affected *Townsend's* understanding of the nature and premises of habeas corpus proceedings in general. The secondary, backstop role of federal habeas proceedings, more limited today than at the time of *Townsend*,[32] means due process demands more of state habeas proceedings. Due to the withdrawal of federal habeas review, there is an increased risk of an erroneous deprivation of rights whenever state habeas proceedings are lacking.

Since the enactment of the AEDPA, the scope of federal habeas corpus review has been sharply narrowed. Where states facilitate the resolution of postconviction claims in state court,

[32] *See, e.g.*, Lee Kovarsky, *Structural Change in State Postconviction Review*, 93 Notre Dame L. Rev 443, 460-61 (2017) (quoting Joseph L. Hoffman & Nancy J. King, Essay, *Rethinking the Federal Role in State Criminal Justice*, 84 N.Y.U. L. Rev. 791, 809 (2009) ("The cumulative effect of the substantive and procedural restrictions on the federal habeas remedy—which some prominent scholars now call a 'pipe dream'—is to transform State PCR into the pivotal postconviction forum.")

state prisoners are required to exhaust those opportunities, and state court fact-findings are afforded deference in federal court. 28 U.S.C. § 2254(d). Moreover, after AEDPA, state *legal* conclusions also receive deferential treatment in federal court. 28 U.S.C. § 2254(d)(1). *See, e.g., Buntion v. Quarterman*, 524 F.3d 664, 670 (5th Cir. 2008). In the ordinary civil context, Congress requires federal courts to give preclusive effect to state court adjudications to the same extent as the courts of the state from which the judgments emerged would do so. 28 U.S.C. § 1738; *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Habeas corpus in federal court, with its requirement of exhaustion of state remedies, has historically been exempt from this requirement. *See Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 485 & n.27 (1982) (citing 28 U.S.C. § 2254 as exception to the "traditional rules of preclusion"). While habeas corpus is still exempt from the application of § 1738, Congress directly introduced preclusion for the first time in federal habeas corpus proceedings by way of § 2254(d) in the AEDPA. As this Court has recently explained, with only a couple of exceptions AEDPA's § 2254(d) imposes "a complete bar on federal court relitigation of claims already rejected in state proceedings." *Harrington v. Richter*, 562 U.S. 86, 102 (2011). Put simply, AEDPA reflects the view that "state courts are the principal forum for asserting constitutional challenges to state convictions." *Id*. at 103. That forum must, then, provide review that is meaningful.

This Court "has constantly emphasized the fundamental importance of the writ of habeas corpus in our constitutional scheme" and "has steadfastly insisted that 'there is no higher duty than to maintain it unimpaired.'" *Johnson v. Avery*, 393 U.S. 483, 485 (1969) (quoting *Bowen v. Johnston*, 306 U. S. 19, 26 (1939)). Because the purpose of the writ is to enable those unlawfully incarcerated to obtain their freedom, "it is fundamental that access of prisoners to the courts for the purpose of presenting their complaints may not be denied or obstructed." *Id*. Given the

restructuring of federal habeas corpus review, this Court should ensure that the principal—and in most cases only—forum for adjudicating constitutional challenges to state convictions affords and enforces a post-conviction process that is adequate for obtaining results reliable enough to vindicate the important constitutional rights that habeas corpus safeguards.

Whatever process is due, it is clear that the state court must observe fundamental due process in adjudicating Acker's right to post-conviction relief. "Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950). Here, the TCCA's non-adjudication of his claims denied Acker the opportunity for a "hearing appropriate to the nature of the case." *Id*.

It was not until Acker was pursuing habeas relief in federal court and evidence was presented in those proceedings that the State was compelled to repudiate the factual basis for Acker's conviction (while also providing credence to Acker's version of events, namely that the victim jumped from his truck). Because both the factual and legal bases for challenging his conviction were tied to the State's repudiation and therefore were not available to Acker at the time he filed his prior state habeas applications, Acker did not and could not have challenged his conviction and sentence on such grounds in his initial state habeas application. After relief was denied in federal court, Acker returned to the principal forum—state court—to seek constitutional review of his conviction in light of the evidence presented in federal court. When Acker returned to state court and presented his constitutional challenges, he brought with him not only new legal and factual bases that were previously unavailable to him, but he also showed that the State disavowed their trial theory of liability and changed it to one that was never

presented to the jury, that he pushed the victim from the truck. In fact, in federal habeas, the State switched again to a third theory to coincide with the federal district court's ruling that Acker rendered the victim unconscious in his truck, laid her on the ground and then deliberately ran over her. *No witness ever testified to that at Acker's trial*. In such a situation, due process requires a post-conviction process that provides an adequate review of the conviction.

While Acker attached evidentiary proffers to his application, the proffers were never intended to be the totality of the evidence he would rely on to establish the elements of his claims in a hearing. There is no requirement in Texas that a habeas applicant attach exhibits to or "plead evidence" in a habeas application. *Ex parte Medina*, 361 S.W. 3d 633, 639 (Tex. Crim. App. 2011). As in federal court, a state habeas application is a pleading that sets out allegations. A habeas applicant has no more burden to prove the allegations true in the application itself than the prosecution does to prove the allegations in an indictment true in the indictment itself, or a civil plaintiff has a burden to prove the allegations in a complaint true in the complaint itself. The CCA's dismissal of Acker's subsequent habeas application without providing a process to review his judgment deprived him of due process.

Resolution of disputed factual questions made by a judicial body must be based on evidence that is admitted at a hearing. *Morgan v. United States*, 298 U.S. 458, 480-81 (1936). *See also Goldberg v. Kelly*, 397 U.S. 254, 258 (1970) ("rudimentary due process" requires "an effective opportunity" to present one's case).

Had the State afforded Acker an opportunity to be heard, in accordance with due process, he could have presented evidence in support of his constitutional challenges. Whether or not Acker's underlying due process and innocence claims ultimately entitle him to relief from his capital judgment, he is at least entitled to a fair opportunity to prove he is unlawfully confined

because he was deprived of this important constitutional right during his capital trial and to an adjudication which comports with fundamental due process.

CONCLUSION

For the forgoing reasons, the Court should grant the petition for writ of certiorari to consider the questions presented by this petition and grant the accompanying motion for a stay of execution.

Respectfully Submitted,

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